Tan Hun Wah v Public Prosecutor and another appeal

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 106 OF 1988 AND 107 OF 1988
JEMURI SERJAN CJ (BORNEO), MOHAMED AZMI AND PEH SWEE CHIN SCJJ
15 DECEMBER 1993

Criminal Procedure *— Trial — Trafficking in dangerous drugs — Frequent adjournments — Delays in trial and providing grounds of judgment — Whether prejudice caused to appellants — Appropriate remedy — Dangerous Drugs Act ss 6 & 39B — Courts of Judicature Act 1964 s 60*

Criminal Procedure *— Trial — Trafficking in dangerous drugs — Onus of proof — Onus on prosecution to prove beyond reasonable doubt — Onus placed on defence to clear judge's doubt — Whether fatal*

Evidence *— Burden of proof — Trafficking in dangerous drugs — Failure of prosecution to call witness — Whether onus on defence to clear doubts created in judge's mind*

The appellants had been jointly charged for the offence of trafficking in raw opium alleged to have been committed on 8 February 1984. The defence of both the appellants was one of innocent carriers. They denied trafficking in the drugs and put the blame on one Akuaili Singh, who had been arrested on 8 February 1984 but had since disappeared. From the date of their arrest in 1984, the appellants had been under remand continuously right up to 30 October 1988 when they were found guilty, convicted and sentenced to death under s 39B of the Dangerous Drugs Act 1952 ('the Act'). The trial was spread over a period of approximately nine months and six days, because of the numerous adjournments. There was also a delay of about three years and three months before the trial judge's grounds of judgment were supplied in February 1992. In his grounds of judgment, the trial judge failed to consider the prosecution's failure to call Akuaili Singh as a witness or to offer him to the defence. The appellants have appealed.

The principal issue for determination was whether these delays in the trial and the supply of grounds of judgment had prejudiced the appellants, and if so what appropriate remedy should be ordered by the court to cure or mitigate the prejudice or unfairness.

Held, allowing the appeal:

(1) The general principle that 'justice delayed is justice denied' does not mean that every form of delay should result in vitiating the whole proceedings. However, the principle of fair trial should be applied even more rigorously where the excessive delay is caused not by the prosecution but by the trial court itself. If the facts of a case warrant it, where there is a long delay in the supply of grounds of judgment, an appellate court would readily accept the

A allegation of prejudice on the basis that there was every likelihood not only that the trial judge's impression on demeanour of witnesses would be blurred, but also the delay would increase the chances of omission on the part of the trial judge to deal with material facts and issues in the grounds of judgment, which ought to have been favourable to the appellants.

B (2) The prosecution was to blame for not calling Akuaili Singh as a witness to explain himself or to make him available to the defence and the delays must have contributed to the trial judge's fatal omission to consider this. The burden on the defence was merely to cast a reasonable doubt on the prosecution's case. The judge

C had therefore erred in law in placing the onus on the defence to clear the unexplained behaviour of Akuaili Singh on the trafficking charge. It is trite law that no burden at all is placed on the defence to clear whatever doubts that have been created in the mind of the judge, and in the absence of Akuaili Singh giving evidence, the law required that those doubts must be resolved in favour of the

D appellants.

(3) On the facts of this case, prejudice had sufficiently been demonstrated from the notes of evidence and the grounds of judgment as a result of delays not only in the trial itself but also in supplying the grounds of judgment. Pursuant to s 60 of the

E Courts of Judicature Act 1964, the convictions under s 39B of the Act were quashed and substituted with convictions under s 6; and the death sentences set aside and substituted with life imprisonment with six strokes of the rotan each under s 39A of the Act.

Obiter:

F (1) After the first adjournment, fixing the case for continuation at a stretch for five or six days until its conclusion would have been more realistic even if it entailed the postponement of other cases already on the hearing list. If adjournments were unavoidable, they should be short ones so as not to lengthen the overall

G duration of the trial. It was unacceptable to adjourn a partly heard criminal trial sine die or to a date to be fixed, because such a practice would inevitably result in inordinate delays in the administration of justice and affect the quality and reliability of the judgment of the court in the evaluation of the evidence.

(2) Written submissions are useful particularly on issues of law, but

H they suffer from the same weaknesses as delayed grounds of judgment when dealing with issues of fact. Unless absolutely essential, the court should insist on oral submissions in criminal trials, when the evidence is still fresh in the minds of all concerned.

I **[Bahasa Malaysia summary**

Perayu telah dituduh bersesama atas kesalahan mengedar candu mentah yang dikatakan telah berlaku pada 8 Februari 1984. Pembelaan kedua-dua perayu adalah bahawa mereka cuma merupakan pembawa

tanpa pengetahuan tentang dadah itu. Mereka menafikan bahawa mereka telah mengedar dadah dan menyalahkan seorang yang bernama Akuaili Singh, yang telah ditangkap pada 8 Februari 1984 tetapi sejak itu telah menghilangkan diri. Dari tarikh mereka ditangkap pada tahun 1984, perayu telah terus ditahan sehingga 30 Oktober 1988 apabila mereka didapati bersalah, disabit dan dihukum mati di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta itu'). Perbicaraan itu telah mengambil masa hampir sembilan bulan enam hari, oleh kerana beberapa tangguhan kes itu. Juga terdapat kelengahan hampir tiga tahun tiga bulan sebelum alasan penghakiman hakim perbicaraan kes itu dibekalkan pada Februari 1992. Dalam alasan penghakimannya, hakim perbicaraan gagal mempertimbangkan kegagalan pihak pendakwa untuk memanggil Akuaili Singh sebagai seorang saksi atau menawarnya kepada pihak pembelaan. Perayu telah membuat rayuan.

Isu utama untuk diputuskan adalah sama ada kelengahan dalam perbicaraan dan dalam pembekalan alasan penghakiman telah memudaratkan perayu, dan jika ya, apakah remedi yang sesuai yang patut diperintahkan oleh mahkamah untuk membetulkan atau meringankan kemudaratan atau ketidakadilan itu.

Diputuskan, membenarkan rayuan itu:

(1) Peraturan am bahawa 'keadilan dilengahkan adalah keadilan dinafikan' ('justice delayed is justice denied') tidak bermakna bahawa setiap bentuk kelengahan seharusnya mentaksahkan keseluruhan prosiding. Bagaimanapun, prinsip perbicaraan yang adil harus terpakai dengan lebih ketat lagi di mana kelengahan keterlaluan itu disebabkan bukan oleh pihak pendakwa tetapi oleh mahkamah perbicaraan sendiri. Jika fakta sesuatu kes mewajarkannya, di mana terdapat kelengahan panjang dalam pembekalan alasan penghakiman, sesuatu mahkamah rayuan akan bersedia menerima pengataan kemudaratan atas dasar bahawa bukan sahaja terdapat kemungkinan besar tanggapan hakim perbicaraan mengenai tingkahlaku saksi akan terkabur, tetapi juga kelengahan itu akan meninggikan kemungkinan peninggalan pada pihak hakim perbicaraan untuk bertindak terhadap fakta dan isu material dalam alasan penghakimannya, yang mungkin memihak kepada perayu.

(2) Pihak pendakwa patut dipersalahkan kerana tidak memanggil Akuaili Singh sebagai seorang saksi untuk menjelaskan dirinya atau menyediakannya kepada pihak pembelaan dan kelengahan itu mestilah merupakan antara sebab yang menimbulkan peninggalan padah hakim perbicaraan untuk mempertimbangkan perkara ini. Beban yang terletak pada pihak pembelaan hanyalah untuk menimbulkan keraguan munasabah terhadap kes pihak pendakwa. Oleh itu, hakim telah membuat kesilapan di sisi undang-undang apabila meletakkan beban ke atas pihak pembelaan untuk menerangkan kelakuan Akuaili Singh berkaitan dengan tuduhan mengedar dadah itu. Adalah menjadi undang-undang mantap

bahawa tidak ada beban yang terletak di atas pihak pembelaan untuk menerangkan sebarang keraguan yang timbul dalam fikiran hakim, dan tanpa kehadiran Akuaili Singh untuk memberi keterangan, undang-undang memperuntukkan supaya keraguan itu diputuskan memihak kepada perayu.

(3) Atas fakta kes ini, kemudaratan telah secukupnya ditunjukkan oleh nota keterangan dan alasan penghakiman akibat daripada kelengahan bukan sahaja dalam perbicaraan itu sendiri tetapi juga dalam pembekalan alasan penghakiman. Mengikut s 60 Akta Mahkamah Kehakiman 1964, sabitan di bawah s 39B Akta itu dibatalkan dan diganti dengan sabitan di bawah s 6; dan hukuman mati diketepikan dan diganti dengan hukum penjara seumur hidup dengan enam sebatan rotan setiap orang di bawah s 39A Akta itu.

Obiter:

(1) Selepas tangguhan pertama, penetapan sambungan kes itu selama lima atau enam hari berturut-turut sehingga penyelesaiannya adalah lebih realistik walaupun ia mungkin melibatkan penangguhan kes lain yang telahpun disenaraikan untuk perbicaraan. Jika tangguhan tidak dapat dielakkan, ia patut merupakan tangguhan yang singkat supaya tidak memanjangkan tempoh keseluruhan perbicaraan itu. Penangguhan sine die sesuatu kes jenayah yang telah dibicara sebahagian atau penangguhan sehingga suatu tarikh yang akan ditetapkan tidak boleh diterima, kerana amalan seperti itu pasti akan mengakibatkan kelengahan melampau dalam pentadbiran keadilan dan menjejaskan kualiti serta kebolehpercayaan penghakiman mahkamah mengenai penilaian keterangan itu.

(2) Hujah bertulis adalah berguna terutamanya mengenai isu undang-undang, tetapi mempunyai kelemahan yang sama seperti alasan penghakiman yang dilengahkan berkenaan isu fakta. Kecuali jika benar-benar diperlukan, mahkamah patut mendesak supaya hujah lisan dibuat dalam perbicaraan jenayah, apabila keterangan masih segar dalam ingatan semua yang berkenaan.]

Notes

For a case on frequent adjournments during trial, see 5 *Mallal's Digest* (4th Ed) para 2632.

For cases on the onus of proof in a criminal trial, see 5 *Mallal's Digest* (4th Ed) para 2731–2734.

Cases referred to

1 *Yeoh Siew Khek v PP* (Supreme Court Criminal Appeal 05–13–1989, 15 June 1993) (unreported) (folld)
2 *Jago v District Court of New South Wales* (1989) 63 ALR 644 (folld)
3 *Barton & Anor v R* (1980) 147 CLR 75 (folld)
4 *Voon Chin Fatt v PP* [1948–49] MLJ Supp 131 (folld)
5 *TN Nathan v PP* [1978] 1 MLJ 134 (folld)

6 *Yusoff bin Kassim v PP* [1992] 2 MLJ 183 (folld) A
7 *Ling Ah Hun v PP* (Perak Criminal Appeal No 26 of 1960, referred to in [1960] MLJ xlv) (folld)

Legislation referred to
Courts of Judicature Act 1964 s 60 B

Appeal from: Criminal Trial No 6 of 1985 (High Court, Alor Setar)

R Rajasingam (*R Rajasingam & Co*) for the first appellant.
Karpal Singh (*Karpal Singh & Co*) for the second appellant.
Ng Aik Guan (Deputy Public Prosecutor) for the respondent. C

Mohamed Azmi SCJ (delivering the grounds of judgment of the court): The two appellants in this consolidated criminal appeal were jointly charged for trafficking in 37.326kg of raw opium on 8 February 1984 at Jalan Ladang Kelapa Sawit, Batu Pekaka, Kuala Ketil, Baling, in the state of Kedah, an offence punishable with the mandatory death sentence under s 39B D of the Dangerous Drugs Act 1952 ('the Act'). From the date of their arrests in 1984, they had been under remand continuously right up to 30 October 1988 when they were found guilty, convicted and sentenced to death by the Alor Setar High Court. They were aggrieved by the said decision and had separately filed their notices of appeal on 1 and 2 November 1988. When E their appeal came up before us on 27 September 1993, Mr Karpal Singh, counsel for the second appellant, with the support of Mr Rajasingam, counsel for the first appellant, brought our immediate attention to the extraordinary long delay in supplying the grounds of judgment which he contended had prejudiced the appellants in the prosecution of their appeal, and he therefore sought our intervention. The delay was one of the grounds F contained in the petition of appeal, and Mr Karpal Singh had obliquely referred to the case of *Yeoh Siew Khek v PP*,[1] wherein this court (Abdul Hamid Omar LP, Eusoff Chin and Wan Yahya SCJJ) had in similar circumstances quashed the death sentence and substituted it with imprisonment for life. G

In this case, the trial proper commenced on 24 January 1988. It was adjourned for continuation of hearing to 6 and 8 February, and again to 27 February. When the prosecution finally closed its case the next day, on 28 February 1988, the trial was adjourned to a date to be fixed. It was finally fixed for continuation on 27 July 1988, five months later. On that date, the trial judge called both the appellants to enter their defence. After H giving their evidence on oath, the appellants closed their case the very next day, on 28 July 1988. The trial was then adjourned three times for final submission by counsel, and finally on 30 October 1988, both the appellants were found guilty and convicted. Thus, the whole trial was spread over a period of approximately nine months and six days, although from the I events that had transpired, the prosecution only required five days and the defence two days to complete their respective evidence from a total of ten witnesses, inclusive of the two appellants.

A Apart from the delay in the trial itself, it was not in dispute that the grounds of judgment of the learned trial judge was supplied to the appellants, presumably through his Lordship's secretary, only in February 1992, a further delay of about three years and three months from the filing of the notices of appeal in early November 1988. To acquaint ourselves with the facts leading to this long delay, we had taken it upon ourselves to examine B the notes of evidence in great detail, and had discovered some startling facts. As can be seen from the numerous adjournments, the trial was chopped up and conducted on an instalment basis for a few days at a time extending over a period of more than nine months. Such a debilitating trial was certainly against the accepted practice and procedure of criminal trials C in this country ever since the Registrar's Circular No 3 of 1960 was issued, which required that once a case commenced, it should be carried on from day to day until its conclusion, unless some unforeseen circumstances occurred during the trial so as to make it absolutely essential for the court to grant an adjournment. In the instant case no one could tell us why it was absolutely essential for the trial to be spread over almost the whole of 1988. D We were of the view that after the first adjournment, fixing the case for continuation at a stretch for five or six days until its conclusion would have been more realistic even if it entailed the postponement of other cases already on the hearing list. Further, if the various adjournments were unavoidable, they should be short ones so as not to lengthen the overall E duration of the trial. It is certainly unacceptable to adjourn a partly heard criminal trial sine die or to a date to be fixed, because such a practice would inevitably result in inordinate delays in the administration of justice and affect the quality and reliability of the judgment of the court in the evaluation of the evidence particularly in the demeanour of witnesses during cross-examination, and the special significance of certain primary evidence as the F basis for making inferences. Written submissions are useful up to a point, particularly on issues of law, but they invariably suffer from the same weaknesses as a delayed grounds of judgment when dealing with issues of fact. Unless absolutely essential, the court should insist on oral submissions in criminal trials, when the evidence is still fresh in the minds of all G concerned.

It was against this backdrop of persistent delays in the conduct of the criminal trial that both the learned counsel for the appellants had submitted to us at the commencement of this appeal that the interests of justice demanded that the conviction for trafficking under s 39B and the death sentence on both the appellants could not and should not be sustained. H However, it was also contended that the interests of justice warranted that, in lieu thereof, the conviction should be reduced to one of possession of raw opium under s 6 read with s 39A of the Act, on the principal ground of prejudice to the appellants occasioned by the three year delay in supplying them with the grounds of judgment.

I The principal issue for determination was whether these delays in the trial and the supply of grounds of judgment had prejudiced the appellants, and if so what appropriate remedy should be ordered by this court to cure or mitigate the prejudice or unfairness.

Delay in court proceedings means that there is an excessive interval between the point when a case is commenced and when it can be adjudicated. The definition of 'excessive' is often not articulated but the concept is clear enough. The grievance is that an unreasonably long time is required to obtain justice. Underlying the grievance is an implicit model of a just system of justice, in which each case moves to conclusion within a time interval proportionate to its importance and complexity (see the article on 'Court Delay' by Goffery C Hazard Jr in *Civil Justice Quarterly* (1986) at p 236).

There are however many causes of delay in court proceedings, and the delay itself can take the form of an abuse of process or may appear in various forms of prejudice or unfairness. The principle that 'justice delayed is justice denied' is of general application, and it does not follow that every form of delay, though frowned upon by the courts, should result in vitiating the whole proceedings. In *Jago v District Court of New South Wales*[2] where there was delay by the prosecution in bringing an indictment, the High Court of Australia, though refusing recognition of a common law right to a speedy trial, affirmed the right of an accused person to receive a fair trial as one of the fundamental rights of the accused in the administration of criminal justice. To obtain a permanent stay of prosecution, the application must however be based on actual prejudice or unfairness and not merely on 'presumptive prejudice'. At p 644, in refusing permanent stay, Mason CJ said:

> In the safeguarding of the interests of the accused in the manner I have described, the touchstone in every case is fairness. As appears from Toohey J's reasons for judgment and the majority judgments in the Court of Appeal, the Australian common law does not recognize the existence of a special right to a speedy trial, or to trial within a reasonable time, which relies for its operation not upon actual prejudice or unfairness but upon a concept of presumptive prejudice. Because there is no constitutional guarantee of a speedy trial, the remedies are discretionary and necessarily relate to the harm suffered or likely to be suffered if appropriate orders are not made.
>
> The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial: see *Barton v R* (1980) 147 CLR 75 at pp 102 and 106: *R v Sang* [1971] Crim LR 428 at p 437; *Carver v A-G* (NSW) (1987) 29 A Crim R 24 at pp 31 and 32. At the same time, it should not be overlooked that the community expects trials to be fair and to take place within a reasonable time after a person has been charged. The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case. But they include such matters as the length of the delay, the accused's responsibility for asserting his rights, and of course, the prejudice suffered by the accused: *Barker v Wingo* (1972) 407 US 514; *Bell v DPP* [1985] AC 937, as explained in *Watson and Gorman v Fitzpatrick* (1987) 32 A Crim R 330. In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare: *Re Cooney* (1987) 31 A Crim R 256 at pp 263–264.

A Thus, the High Court in *Jago*[2] strongly echoed its earlier decision in *Barton & Anor v R*[3] in dealing with the requirement of fairness as an essential ingredient of a fair trial. In *Barton*,[3] the main judgment of Gibbs ACJ and Mason J (as he then was) at p 95 had this to say:

> It is one thing to say that the filing of an ex officio indictment is not examinable
> B by the courts: it is quite another thing to say the courts are powerless to prevent an abuse of process or the prosecution of a criminal proceeding in a manner which will result in a trial which is unfair when judged by reference to accepted standards of justice. The courts exercise no control over the Attorney General's decision to commence criminal proceedings, but once he does so, the courts will control those proceedings so as to ensure that the accused receives a fair trial.

C Further down the page, it was stated, 'There is ample authority for the proposition that the courts possess all the necessary powers to prevent an abuse of process and to ensure a fair trial.'

In our view, the principle of fair trial laid down in *Barton*[3] and *Jago*[2] is well founded, and should be applied even more rigorously where the
D excessive delay is caused not by the prosecution but by the trial court itself.

Having perused the appeal record, we could not find anything to suggest that the shocking delay in this case was in any way connected with any element of complexity in either the case for the prosecution or that of the defence. The prosecution case was the usual and typical ambush carried out by the police on a vehicle which resulted in the recovery of a large
E quantity of a dangerous drug. At the material time, the second appellant (Tew He Lay) was in the driver's seat, while the owner of the motorcar, the first appellant (Tan Hun Wah) was seated next to him. These basic facts were not seriously challenged and, in the circumstance of the other relevant evidence adduced by the prosecution, it could not be disputed that both the
F appellants were indeed in custody or control of the raw opium so as to attract the presumption of joint possession by the appellants under s 37(d) of the Act. The huge amount of drug also attracted the presumption of trafficking under s 37(da).

The defence of both the appellants was one of innocent carriers, and consequently they denied trafficking in the said drug. They ostensibly put
G the blame on one Akuaili Singh as the real culprit in the whole episode. At p 85 of the notes of evidence, there appeared to be some difficulty in obtaining the presence of this material and crucial witness. In applying for adjournment on 19 September 1988, Mr Rajasingam informed the court without any apparent contradiction by the prosecution as follows:

H
> (PW5) ... ASP Khalid's evidence had mentioned the arrest of Akuaili Singh. The name of Akuaili Singh was bandied about by the investigating officer. The way PW5 answered the question was that the prosecution was suppressing the arrest of Akuaili Singh on 8 February 1984. I have finally traced Akuaili Singh. He is under restricted residence in Kangar and has now gone to the General Hospital Kuala Lumpur for an eye operation. From instructions given by No (1) it would
> I be ... necessary to bring him to court. It might clear up a lot of doubt or it may give a greater credibility to the prosecution ...

When the hearing resumed on 16 October 1988, the notes of evidence at p 86 disclosed that Mr Rajasingam had again asserted that Akuaili Singh had

been arrested by ASP Khalid (PW5) on 8 February 1984 but since then he had simply disappeared without any trace.

In dealing with the defence in his grounds of judgment, supplied more than three years after the conclusion of the trial, the learned judge had apparently failed to appreciate the significance of the alleged arrest of Akuaili Singh by ASP Khalid on 8 February 1984, ie the very date of arrest of the appellants. Instead, his Lordship had indulged in a sort of soliloquy by answering various questions which he himself had posed on various issues including that of Akuaili Singh, the effect of which would tend to require the appellants to prove their innocence. What the learned judge had omitted to do was to ask himself in the face of the prosecution's failure to call Akuaili Singh as a witness or at least to offer him to the defence, whether the defence had on balance rebutted the statutory presumption of trafficking under s 37(da). Had he done so, as a separate exercise to the other presumption of possession under s 37(d), his Lordship would have avoided the pitfall of asking himself the wrong questions after conceding the probable role of Akuaili Singh in the arrest of the appellants, as contained in the following passage in his grounds of judgment:

> It did occur to me that there was a possibility that Akuaili Singh could have planted the drug in the boot of the first accused's car. In fact he did have the opportunity in the span of those 40 minutes to do so. But then the question which the court must ask is, why did he have to leave those 37g of raw opium in the first accused's car and risk the prospect of losing the drug and the money that goes with it. Why should Akuaili Singh stick his head out if he was found out by the first accused for planting the drug in the boot of the first accused's car? If it was Akuaili Singh's car, it would be different, but it was not his car. It was in the first accused's car. It would be safer and better for Akuaili Singh to have disposed of the drug in the first place and then return the car to the first accused safe and sound. It may well be that he wanted to frame the first accused, but there must be a good and cogent reason, and there was no raison d'etre or rationale for Akuaili Singh to do that. The fact that bothers me is why wasn't there any yellow car following or trailing the first accused's car driven by the second accused, in which the first accused was a passenger. Akuaili Singh could have been the culprit; but why didn't he keep his eyes on the first accused's car?

The delays in this case must have contributed to this fatal omission and therefore had prejudiced the appellants. Akuaili Singh was not a figment of the appellants' imagination. If this crucial witness was indeed arrested by the police, his whereabouts ought to be known by them. As such, if the various acts and conduct of Akuaili Singh were irrational and had remained unexplained, the blame should be laid at the door of the prosecution for not calling him as a witness to explain himself or to make him available to the defence. The burden on the defence is merely to cast a reasonable doubt on the prosecution's case. From the quoted passage in the grounds of judgment, it seemed obvious that the defence had discharged its legal burden. The learned judge therefore erred in law in placing the onus on the defence to clear the unexplained behaviour of Akuaili Singh on the trafficking charge.

If indeed the learned judge had entertained the probability that Akuaili Singh had framed the first appellant, or that Akuaili Singh could have been the trafficker, then it would be the duty of the learned judge to find both the

A appellants not guilty of trafficking under s 39B, but guilty only of mere possession under s 6 read with s 39A. As referred to earlier, it is trite law that no burden at all is placed on the defence to clear whatever doubts that have been created in the mind of the learned judge, and in the absence of Akuaili Singh giving evidence, the law requires that these doubts must be resolved in favour of the appellants.

B Going back on the issue of delay in supplying the grounds of judgment in a criminal appeal, the authority cited to us by Mr Karpal Singh would appear to rest on the ancient axiom that 'justice delayed is justice denied'. In *Voon Chin Fatt v PP*[4] there was a delay of two years in delivering the grounds of judgment. Spencer Wilkinson J, in allowing the appeal, held that C such delay was unsatisfactory and had prejudiced the appellant. The decision was followed by Gunn Chit Tuan J (as he then was) in *TN Nathan v PP*.[5] In that case, the appellant was convicted of an offence under s 4(a) of the Prevention of Corruption Act 1961. The retrial started on 13 June 1972 and was carried out for 77 days over a period of 14 months. It was D concluded on 20 August 1973 and on 29 August 1973, the appellant filed a notice of appeal. But the grounds of decision dated 20 July 1974 were not supplied to the counsel until 2 July 1976. In allowing the appeal, the learned judge held, inter alia, that the delay of another two years before the appellant received the grounds of decision was most unsatisfactory and a prejudice to the appellant.

E Counsel for the appellants also cited to us the case of *Yusoff bin Kassim v PP*[6] at p 187 in which Edgar Joseph Jr SCJ, in delivering the judgment of this court, held that the appellate court should presume that the trial judge had failed to take into account certain facts favourable to the accused, where such facts had been omitted in the grounds of judgment supplied to F the solicitors of the appellants some four years after the notice of appeal had been lodged.

Where prejudice or unfairness had been sufficiently established, we agreed with and adopted the principle enunciated in the authorities cited before us on the effect of excessive delay not only in the supply of grounds of judgment but also delay in the trial itself. If the facts of the case so G warrant, where there is a long delay in the supply of grounds of judgment, an appellate court would readily accept the allegation of prejudice on the basis that there is every likelihood not only that the trial judge's impression on demeanour of witnesses would be blurred, but also the delay would increase the chances of omission on the part of the trial judge to deal with H material facts and issues in the grounds of judgment, which ought to have been favourable to the appellants. Such danger would of course be increased by manifold, when, as in the present case, the trial itself was conducted by instalments over a long period. In this connection, it is relevant to refer to the case of *Ling Ah Hun v PP*,[7] where Rigby J said:

I > But before I leave this case I desire to draw attention to what I consider the quite intolerable delay in the proceedings before the learned president. The offence was committed on 6 January 1959, and both appellants were arrested that same day. Thereafter, there were a number of adjournments, primarily because, as it would appear from the record, the prosecution itself at that time was undecided

as to whether the case should go for a preliminary enquiry or as to whether it should be dealt with summarily by the learned president. Finally, it was decided that the case should be summarily dealt with, and the trial commenced on 10 June 1959 — five months after the offence had been committed. It was then part heard, and did not continue until 16 July — again, some six weeks later. On 16 July the trial concluded and the learned president recorded a conviction. Quite properly, thereafter he adjourned the case in order to obtain a probation officer's report. Proceedings were again heard on 5 August, and sentence was passed on that day. Notice of appeal was at once given that same day, 5 August, and the appellants were released on bail pending the determination of the proceedings. On the notice of appeal being filed it was incumbent upon the learned president to provide his grounds of decision, and for the petition of appeal to be lodged within 10 days after the grounds of decision had been so provided. Those grounds of decision were not supplied until 26 February 1960. It apparently took the learned president six months and 21 days in which to prepare the grounds of decision in this relatively short and simple case. Delays of this nature are wholly intolerable and make an utter farce of the proper and expeditious administration of justice.

As far as prejudice and unfairness are concerned, there ought to be no distinction in principle between delays in the High Court and the subordinate courts. We would with respect adopt the opinion of Rigby J and hold that in the present appeal, the delay of three years in supplying the grounds of judgment from the date of filing of the notices of appeal was wholly intolerable and made an utter farce of the proper and expeditious administration of justice.

On the facts of the present appeal, we found prejudice had been sufficiently demonstrated from the notes of evidence and the grounds of judgment as a result of delays not only in the trial itself but also in supplying the grounds to the appellants or their solicitors. The grounds of judgment was strangely undated, resulting in our inability to determine when the grounds were prepared and signed by the learned judge. Be that as it might, there was no dispute that the document was supplied to the appellants only three years after the filing of the notices of appeal. We were not told of any reason for the delays. In any event, such reason (if any) was irrelevant once the court was satisfied that the appellants had been prejudiced, and the only matter left was to decide how the prejudice could be remedied or mitigated.

The facts and the circumstances of this case required us to exercise the curial function of this court in the administration of criminal justice in the context of the power conferred by s 60 of the Courts of Judicature Act 1964, to 'vary the decision of the trial court, or ... make such other order in the matter as to it seems just, and may by that order exercise any power which the trial court might have exercised'.

The learned deputy public prosecutor, Mr Ng Aik Guan, had quite properly indicated to the court that he had no objection to the remedy which we had intended to provide in this particular case. Having considered the evidence and the circumstances of the present case, we ordered that the appeal by both the appellants be allowed. Consequently we ordered that their convictions under s 39B of the Act be quashed and the death sentences

A set aside. Since there was ample evidence that the appellants were guilty of the offence of possession of raw opium, which incidentally was also the submission of their counsels, we ordered that the conviction under s 39B be substituted with one under s 6 of the Act and we imposed on each of the appellants a sentence of life imprisonment with six strokes under s 39A of the Act. To satisfy the justice of the case, we also ordered that the sentence of imprisonment should take effect from the date of their arrest.

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Appeal allowed.

Reported by Prof Ahmad Ibrahim

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